

Wong Weng Keong v SJ Kenderaan Sdn Bhd

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HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO MT4-12-107 OF 1999
ALIZATUL KHAIR JC
24 SEPTEMBER 2003

Civil Procedure — Appeal — Facts, finding of — Whether evidence sufficient to show motorbus involved in accident — Whether High Court should interfere with sessions court judge's finding

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This was an appeal against the decision of the learned sessions court judge who dismissed the appellant's/plaintiff's claim upon finding that the plaintiff had failed to prove that a Sri Jaya motorbus No WCK 557 was involved in the accident. At about 9.30pm, the plaintiff together with a pillion rider ('SP2') were riding a motorcycle along Jln Universiti heading towards a roundabout when they collided into the defendant's motorbus which was driven at high speed from the opposite direction. As a result of the accident, the plaintiff suffered serious injuries. In this case, the plaintiff's claim rested mainly on the evidence of SP2, who was the sole eye-witness of the accident. The issue to be determined were: (i) whether there was sufficient evidence to show that the motorbus was involved in the accident; and (ii) whether the High Court should interfere with the learned sessions court judge's finding.

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Held, dismissing the appeal with costs:

- (1) SP2's evidence must be viewed with suspicion especially since it was not corroborated by any other evidence such as the sketch plan or damage to the motorcycle or motorbus concerned. In this regard, the learned sessions court judge was right in rejecting his evidence and in finding that SP2 may have made a mistake in reading the said bus's registration number (see p 692B-C).
- (2) It is trite law that in an accident case, the burden of proof is on the plaintiff. It was not sufficient for the plaintiff to merely prove that the motorbus involved was a Sri Jaya bus as there were hundreds of Sri Jaya buses plying the area at any given time. The plaintiff had to identify the tortfeasor, in this case, the motorbus concerned in order to render the defendants liable. However, the plaintiff had failed to do based on the reasons stated earlier (see p 693D-E); *Ng Chul Sia v Maimon binti Ali* [1983] 1 MLJ 110 followed.
- (3) The court was mindful when hearing an appeal from a decision which was based substantially on findings of fact that it should be slow to interfere with such findings unless there was an error of fact or law or serious misdirection on the part of the trial judge such as to warrant an interference, which in the court's view was

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- A not the case here (see p 693E–F); *Siti Aisha binti Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124 followed.

[Bahasa Malaysia summary]

- B Ini adalah rayuan terhadap keputusan hakim mahkamah sesyen yang bijaksana yang telah menolak tuntutan perayu/plaintif setelah mendapati bahawa plaintif gagal untuk membuktikan bahawa sebuah bas Sri Jaya No WCK 557 terlibat dalam kemalangan. Lebih kurang pukul 9.30pm, plaintif bersama seorang pembonceng ('SP2') menunggang motorsikal sepanjang Jalan Universiti menuju ke satu bulatan apabila mereka bertembung dengan bas defendan yang dipandu laju dari arah berlawanan. Akibat daripada kemalangan tersebut, plaintif telah mengalami kecederaan serius. Dalam kes ini, tuntutan plaintif adalah berdasarkan sepenuhnya atas keterangan SP2, yang merupakan satu-satunya saksi yang melihat kemalangan tersebut. Persoalan-persoalan yang perlu ditentukan adalah: (i) sama ada terdapat keterangan mencukupi untuk menunjukkan bahawa bas tersebut terlibat dalam kemalangan tersebut; dan (ii) sama ada Mahkamah Tinggi patut campur tangan dengan penemuan hakim mahkamah sesyen yang bijaksana.
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- E **Diputuskan**, menolak rayuan tersebut dengan kos:

- (1) Keterangan SP2 harus dilihat dengan penuh syak memandangkan ia tidak disokong oleh apa-apa keterangan lain seperti pelan sketsa atau kerosakan kepada motorsikal atau bas berkaitan. Dalam hal sedemikian, hakim mahkamah sesyen yang bijaksana adalah betul dalam menolak keterangan beliau dan mendapati bahawa SP2 mungkin tersilap semasa membaca nombor pendaftaran bas tersebut (lihat ms 692B–C).
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- (2) Adalah undang-undang tetap bahawa dalam satu kes kemalangan, beban bukti terletak atas plaintif. Ia tidak mencukupi untuk plaintif hanya membuktikan bahawa bas yang terlibat adalah sebuah bas Sri Jaya kerana terdapat ratusan bas Sri Jaya yang berlegar pada bila-bila masa. Plaintif hendaklah mengenalpastikan pelaku tort, dalam kes ini, bas berkaitan bagi tujuan menjadikan defendan-defendan bertanggungjawab. Bagaimanapun, plaintif telah gagal untuk berbuat demikian berdasarkan alasan-alasan yang dinyatakan pada mulanya (lihat ms 693D–E); *Ng Chul Sia v Maimon binti Ali* [1983] 1 MLJ 110 diikuti.
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- (3) Mahkamah berhati-hati apabila mendengar satu rayuan daripada satu keputusan yang berdasarkan secara substantif atas penemuan-penemuan fakta di mana ia sepatutnya tidak perlu campur tangan dengan penemuan-penemuan tersebut kecuali jika terdapat satu kesilapan fakta atau undang-undang atau salah arah yang serius di pihak hakim perbicaraan bagi mewarankan
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satu campur tangan, di mana pada pendapat mahkamah bukanlah kesnya di sini (lihat ms 693E–F); *Siti Aisha binti Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124 diikut.] A

Notes

For cases on finding of facts, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 814–819. B

Cases referred to

Ng Chul Sia v Maimon binti Ali [1983] 1 MLJ 110 (folld) C
Siti Aisha binti Ibrahim v Goh Cheng Hwai [1982] 2 MLJ 124 (folld)

CW Chan (*Syarikat Chan Chow Wang*) for the plaintiff.
Thomas Matthews (*Thomas Bala & Assoc*) for the respondent.

Alizatul Khair: This is an appeal against the decision of the learned sessions court judge who had on 3 August 1999 dismissed the appellant's/plaintiff's claim with costs. D

The plaintiff's version of the facts was that on 17 October 1992 at about 9.30pm plaintiff ('SP5') together with pillion rider, one Yap Ket Chin ('SP2') were riding motorcycle No WBJ 4024 along Jln Universiti heading towards the Bulatan Section 16/1 roundabout from the direction of Jalan Gasing. Upon approaching the turning to Jln 12/13 the defendant's ('SJ Kendaraan Sdn Bhd') motorbus WCK 557 which was coming from the opposite direction at high speed and without stopping suddenly turned into Jln 12/13 and collided into the plaintiff's motorcycle. As a result of the accident, the plaintiff suffered serious injuries and was admitted and warded in the Intensive Care Unit ('ICU') of the University Hospital. E F

The defendant denied that its motorbus No WCK 557 ('said motorbus') was involved in the said accident. The learned sessions court judge after hearing evidence from both the plaintiff and defendant's witnesses, dismissed the plaintiff's claim upon finding that plaintiff had failed to prove the said motorbus was involved in the said accident. G

In this case, the plaintiff's claim rested mainly on the evidence of SP2, the pillion rider who is the sole eye-witness of the accident. In his evidence before the court below, SP2 said he saw the bus's registration number when it stopped after turning into Jln 12/13. In examination-in-chief he said, 'Kami dari Jalan Gasing hala ke atas dan pj bas dari arah selatan 16/1 masuk ke kanan ke Jalan 12/13. Masa itu, Wong Weng Keang ('plaintiff') langgar belakang bas. Bas itu berhenti sekejap selepas langgar kemudian dia lari selepas saya bangun. Apabila bas berhenti sekejap saya tengok nombor bas WCK 557.' (p 31 of the appeal record). In cross-examination, SP2 said 'saya nampak nombor bas bila dia berhenti lebih kurang 1 minit dan saya H I

A sudah bangun.’ Upon further cross-examination, he said ‘Bas sudah jalan ke depan baru saya nampak nombor bas dari belakang.’

B However, although he claimed to have seen the registration number of the bus, SP2 did not lodge any police report after the accident. Unlike the plaintiff who was seriously injured and hospitalized SP2 only received outpatient treatment at the hospital. As he said in evidence, ‘saya tak cedera teruk. Saya boleh berdiri dan berjalan.’ (p 32 of the appeal record). When asked during cross-examination, he admitted, ‘saya tak buat laporan polis.’ Instead, he followed Wong Poh Tai (SP4), the plaintiff’s sister to the police station to lodge a report.

C At the police station, he waited outside whilst SP4 made her report. According to SP2 he told SP4 the bus involved was a Sri Jaya bus but he did not tell her the bus’s registration number. This was confirmed by SP4 in her evidence and from her report at p 71 of the appeal record.

D The plaintiff (‘SP5’) could not shed much light except to say how the accident happened. In his police report, which he lodged almost a year after the accident (p 72 of the appeal record), he stated that he was involved in an accident with a motorbus ‘no tak tahu’ with words ‘bas Sri Jaya’ in brackets added on in cross-examination SP5 had stated that, ‘Saya tahu bas kepunyaan Sri Jaya kerana pembonceng saya yang bagi tahu bas ialah Bas Sri Jaya, saya tak tahu.’

F The other witness who gave evidence for the plaintiff was the Investigation Officer (‘IO’), Insp Kunjirame a/l Appoo (‘SP1’). SP1 was working at the Cawangan Trafik Petaling Jaya as Penolong Sarjan at the time of the accident. However, he only drew the sketch plan on 12 October 1999 some three years after the accident. According to SP1, he was unable to get any information from the plaintiff when he visited him at the hospital as the latter was in a coma. When the plaintiff lodged his report on 2 November 1993, SP1 was away attending a course at Kuala Kubu Bharu after which he was transferred to Bukit Aman. No one was sent to replace him at Petaling Jaya and it was only upon Bukit Aman’s directive that he returned to the place of accident and with the help of the plaintiff drew the sketch plan. Not surprisingly the sketch plan (P1, pp 62–63 of the appeal record) merely showed the location of the accident with no indication as to how the accident could have occurred. Other than the sketch plan SP1’s evidence could not contribute much to the plaintiff’s case. All he knew was that an accident involving a motorcycle and a bus took place on 19 October 1992. He did not know the bus’s registration number. He did not see the motorcycle and as such did not know the extent of the damage on the motorcycle. He had only the first information report made by Wong Poh Tai (‘SP5’). Apart from what was told to him by plaintiff and SP5 he did not have any other information about the accident. In his words, ‘Dari siasatan selain dari apa yang dibagitahu kedua pihak saya tak tahu bas itu bas apa cuma tahu bas Sri Jaya.’

It is very clear from the plaintiff's case as set out above that the evidence, if any to support its claim that defendant's motorbus WCK 557 was involved in the accident is at best tenuous. As we have seen, SP2 on whom the plaintiff's case rested had all this while displayed what appeared to be an inexplicable reluctance to inform anyone of the said motorbus' registration number. He did not lodge a police report, did not inform SP5 nor the police ('Police tak tanya' was his blithe reply when asked why did not do so) nor even plaintiff when the latter lodged his report a year later. Yet four years later, SP2 decided to appear in court and insisted that he saw the bus's registration number and that it was WCK 557. To my mind, his evidence must be viewed with suspicion especially since it is not corroborated by any other evidence such as the sketch plan or damage to the motorcycle or motorbus concerned. In this regard, the learned sessions court judge was right in rejecting his evidence. The learned sessions court judge was also right in finding that SP2 may have made a mistake in reading the said bus's registration number. SP2 in his evidence stated that he saw the said bus's registration number when the latter stopped briefly ('lebih kurang satu minit') after turning into the junction. However, if as alleged the bus was driving at high speed, it is unlikely that the bus could have stopped immediately, and therefore the inference that it had stopped some distance from the junction where SP2 was standing is not unreasonable. Further, the accident happened at 9.30pm and the area near the junction is not well lit because the street lights are placed in the centre of the road (Jln Universiti) as is apparent from the sketch plan. Thus, the possibility of SP2 making a mistake (as to the bus's registration number) is not altogether unfounded.

The defendants in this case had produced two witnesses to rebut the plaintiff's claim that the said motorbus was involved in the accident. SD1 was the supervisor (Penyelia) of the defendant's motorbuses whilst SD2 was the driver of the said motorbus at the time of the accident. Both had given evidence to the effect that the said motorbus WCK 557 could not have seen involved in the accident for the following reasons:

- (a) motorbus WCK 557 was already in the defendant's garage at Asia Jaya by 8pm on 17 October 1992. The accident occurred at 9.30pm; and
- (b) motorbus WCK 557 did not pass through Jln Universiti at any time on 17 October 1992. Instead it followed the Taman Tun Dr Ismail route to go to Kuala Lumpur and was back at the garage by 7.30pm.

The evidence and credibility of both SD1 and SD2 were attacked by the appellants in their memorandum of appeal. However, the learned sessions court judge in her grounds of judgment had this to say:

Keterangan dari SD1 dan SD2 adalah kukuh tidak tercabar dalam soal balas. Mahkamah tidak ada sebab untuk menolak keterangan saksi-saksi. Walaupun SD1 tidak dapat kemukakan dokumen mengesahkan kemasukan bas WCK 557 ke garaj sebelum 8 malam pada 17 Oktober 1992, SD1 mengesahkan bahawa terdapat catitan dibuat mengenai perkara ini sehingga 1996.

- A Selepas 1996 catitan tersebut telah hilang dan SD1 telah memberi sebab-sebab kehilangan. Mahkamah menerima keterangan beliau.

In the light of the explanation given by the learned sessions court judge, I can see no reason whatever for this court to interfere with her finding. In any event, it is the court's view that even without relying on the evidence of SD1 and SD2, plaintiff's evidence alone is insufficient to show that motorbus WCK 557 was involved in the accident.

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It is trite law that in an accident case, the burden of proof is on the plaintiff. As succinctly stated by Hashim Yeop A Sani J (as he then was) in *Ng Chul Sia v Maimon binti Ali* [1983] 1 MLJ 110 at p 111:

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When an accidental harm is done it is not for the doer to excuse himself by proving that the accident was inevitable and that there was no negligence on his part. It is for the person who suffers the harm to prove affirmatively that the accidental harm was due to the negligence of the other person.

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To my mind, it is not sufficient for the plaintiff to merely prove that the motorbus involved was a Sri Jaya bus as there are hundreds of Sri Jaya buses plying the area at any given time. The plaintiff has to identify the tortfeasor, in this case, the motorbus concerned in order to render the defendants liable. And this in my view, the plaintiff has failed to do based on the reasons stated earlier.

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The court is mindful when hearing an appeal from a decision which is based substantially on findings of fact that it should be slow to interfere with such findings unless there is an error of fact or law or serious misdirection on the part of the trial judge such as to warrant an interference, which in the court's view is not the case here. There is no dearth of authority on this principle and I need only quote the case of *Siti Aisha binti Ibrahim v Goh Cheng Hewai* [1982] 2 MLJ 124 in which the Federal Court stated thus at p 126:

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The principle that should guide an appellate court in this regard is to be found in Privy Council case of *Yahaya bin Mohamad v Chin Tuan Nam* [1975] 2 MLJ 117. This was a running down case where the crucial issue was on which side of the line the collision took place. The Judge considered the evidence of witnesses, the sketch plan and police photograph and arrived at a specific finding of fact. The Privy Council held that the finding of a Presiding Judge should not have been disturbed. It is only in a rare case that an appellate court, lacking the advantage of seeing and hearing the witnesses, was justified in coming to a different conclusion from the trial Judge on the question of credibility.

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For the reasons stated above, the appeal is hereby dismissed with cost. I only wish to add by way of postscript that while the court fully sympathizes with the plight of the plaintiff, the court cannot in all fairness, based on the evidence that has been adduced find in favour of the plaintiff.

Appeal dismissed with costs.

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